SUPREME COURT, U. S.

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# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 77

JOHN HOLLAND, *et al.*,

*Petitioners,*

v.

THE LUCAS COUNTY BOARD OF ELECTIONS, *et al.*,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

## BRIEF OF RESPONDENT CITY OF TOLEDO, OHIO IN OPPOSITION.

JOHN A. DEVICTOR, JR.,
*Assistant Director of Law,*
*City of Toledo, Ohio,*
Safety Building,
Toledo, Ohio,
*Attorney for Respondent.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1409.

JOHN HOLLAND, *et al.*,

*Petitioners,*

v.

THE LUCAS COUNTY BOARD OF ELECTIONS, *et al.*,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

## BRIEF OF RESPONDENT CITY OF TOLEDO, OHIO IN OPPOSITION.

## INTRODUCTION.

The petitioners filed their Petition in Contest of Election pursuant to Section 3515.08 of the Ohio Revised Code in the Common Pleas Court of Lucas County, Ohio. The presiding judge found that said petition was not well taken as to any of the three causes of action set forth therein and said petition was dismissed. The judge filed a written memorandum in support of his decision. Under authority of Section 3515.15 of the Ohio Revised Code, the petitioners appealed the decision directly to the Supreme Court of Ohio, which on February 7, 1968, denied the petitioners' motion for leave to appeal, dismissed the appeal for the reason that no substantial constitutional question existed and ordered execution of the lower court judgment. Whereupon petitioners brought their cause here.

## STATEMENT OF FACTS.

The Agreed Statement of Facts admitted into evidence at the trial of this matter is as follows:

The City of Toledo, in northwestern Ohio, has a population of 318,003 as of 1960 Federal census and as of April 1, 1967, an estimated 394,500. It has been a charter city since January 1, 1916.

On March 20, 1967, the nine members of City Council passed Open Occupancy Ordinance No. 168-67 as an emergency measure. Three days later a Petition for a Referendum was checked at the Clerk's Office of City Council, approved as to form and on April 18, 1967 some 792 Referendum Petitions were filed containing approximately 30,327 signatures; 17,466 were verified by the clerk and forwarded to the Lucas County Board of Elections on April 19, 1967.

On May 1, 1967, the Board established the date of September 12, 1967, which was the date for a primary election, for a vote and announced the official returns September 18, 1967 and certified to the Secretary of State that 54,518 voted for repeal and 22,827 voted to retain the ordinance.

Ten days thereafter the 29 contestors filed their Petition in Contest of Election. The City of Toledo filed its Answer followed by petitioners' Reply with Consent of Court.

The following facts are admitted by the pleadings and by stipulations of the parties:

> That the Lucas County Board of Elections is a duly constituted authority of Ohio, whose duties are prescribed by law and that it so functioned as such on September 12, 1967 and prior thereto,
>
> That the City of Toledo was chartered under

authority of Article XVIII, Section 3 of the Ohio Constitution;

That Ted W. Brown as Secretary of State was required to give statutory notice of the results of the vote on the Petition For Referendum as certified to him by the Lucas County Board of Elections;

That twenty-six of the contestors are electors and citizens of Ohio and residents of Toledo, Ohio, and that they voted at the election of September 12, 1967 and cast their vote as to the issue on the ballot—Referendum on Open Occupancy;

That they furnished surety bond set by the Clerk of the Court of Common Pleas of Lucas County, Ohio, and likewise made an additional deposit for court costs;

Under its First Cause of Action it was admitted by the pleadings and stipulation of the parties that except for power reserve to the people, by the initiative and referendum, all other legislative power was vested in the City Council;

Ordinance No. 168-67 was passed as an emergency measure which became effective upon its passage by virtue of Charter Section 43;

The ordinance set forth in Contestors Petition on pages 5 through 10 is Ordinance No. 168-67 as passed by City Council. (See Appendix "E" of Petition for Writ of Certiorari.)

There is as recited in O. R. C. 4112.02, as of October 30, 1965, a housing law entitled "Unlawful Discriminatory Practises" containing certain provisions similar to Ordinance No. 168-67.

Section 81 of the City of Toledo Charter reads as follows:

"SECTION 81. Referendum on Petition.

"Every ordinance passed by the council shall be subject to the referendum if at any time within thirty days a petition signed by electors equal in number to at least fifteen per cent of the total number of ballots cast for councilmen at the preceding municipal election be filed with the clerk, requesting that such ordinance be submitted to the people for consideration."

That the contestors knew for over four months that said election was to be held for the purpose as stated and did nothing to attack its validity or to stop it. That the City of Toledo and the Lucas County Board of Elections proceeded to place said referendum on the ballot and made all other necessary arrangements for the election to be held.

## REASONS WHY THIS WRIT SHOULD NOT BE GRANTED.

### 1. BY STARTING THIS ACTION UNDER SECTION 3515.08 OF THE OHIO REVISED CODE, PETITIONERS ADMIT THAT THE REFERENDUM ELECTION WAS LAWFUL.

Section 3515.08. Contest of election, reads as follows:

§ 3515.08. Contest of election.

The nomination or election of any person to any public office or party position or the approval or rejection of any issue or question, submitted to the voters, may be contested by qualified electors of the state or a political subdivision.

In the case of an office to be filled or an issue to be determined by the voters of the entire state, or for the offices of members of congress, or for judicial offices higher than that of court of common pleas, or for an office to be filled or an issue to be determined by the voters of a district larger than a county, said contest shall be heard and determined by the chief

justice of the supreme court or a justice of the supreme court assigned for that purpose by the chief justice; except that in a contest for the office of chief justice of the supreme court, such contest shall be heard by a justice of such court designated by the governor.

In the case of all other offices or issues, except judicial offices, such contests shall be heard and determined by a judge of the court of common pleas of the county in which the contest arose. In the case of a contest for a judicial office within a county, such contest shall be heard by the court of appeals of the district in which such county is located. If any contestant alleges prejudice on the part of the judges of the court of appeals or the court of common pleas, assigned to hear such appeal, then the chief justice of the supreme court, upon application of any such contestants and for good cause shown, may assign judges from another court to hear such contest.

Section 3515.14. Judgment of Court, reads as follows:

§ 3515.14. Judgment of Court.

Upon completion of the trial of the contest of election, the court shall pronounce judgment as to which candidate was nominated or elected or whether the issue was approved or rejected by the voters.

* * * * *

It can readily be seen from the statement of facts that there were no errors, frauds or mistakes in the election in evidence in this case. In *Cooper v. Kosling*, 154 O. State 207, the court held that the petition failed to state a cause of action for Contest of Election which does not allege that contestee did not receive the largest number of votes or that there was error, fraud or mistake in the tabulation of the votes cast. It is also stated in 19 *O. Jur.* 2d, p. 157 as follows:

"However, it has been said that a contest proceeding was not applicable and not appropriate in a case when the validity of an election was challenged on the ground that there was no legal authority for holding it, * * *."

In view of the above, and especially in view of the fact that the only judgment the court could grant was to state whether the issue was approved or rejected by the voters, the petitioners by bringing this action under Section 3515.08 of the Ohio Revised Code admit that the election was held under lawful authority and that the election itself was lawful.

**2. PETITIONERS BASED THEIR WHOLE CASE ON THE PREMISE THAT THE CHARTER OF THE CITY OF TOLEDO NOW REQUIRES THE APPROVAL OF THE MAJORITY OF THE ELECTORATE BEFORE FUTURE FAIR HOUSING LAWS MAY BE ENACTED, WHICH IS MERELY THEIR CONCLUSION AND NOT BINDING UPON THE COURT.**

**A. Council of the City of Toledo can still pass a Fair Housing Ordinance.**

Section 86 of the City of Toledo Charter reads as follows:

"Sec. 86. Power of the Council to Amend or Repeal.

After the people have legislated for themselves, either by initiating legislation or passing favorably or unfavorably upon legislation referred to them by any body, their action is final and shall not be subject to amendment or repeal, without a general vote of the people of Toledo on same."

It is to be noted that the section specifically uses the words amendment or repeal, but does not contain such words as re-enact or reconsider. It is felt this is important,

as before you can amend or repeal something it must be in existence. Thus, in the case at hand if the referendum had been in favor of the ordinance, the City Council would not have the power to amend or repeal the ordinance without a general vote of the people. However, it does not necessarily follow that Council of the City of Toledo cannot reconsider other ordinances dealing with the subject of fair housing.

As stated in 37 *American Jurisprudence*, at page 854, the general rule is that an ordinance which has been repealed by the municipal council upon the filing of a referendum petition in respect thereto may not be re-enacted in substantially the same form, as this would enable the council to defeat the power of referendum. This rule, however, does not prevent the municipal council from further dealing with the subject matter of the ordinance by enacting another, essentially different, ordinance.

It is assumed by the petitioners that the reason the ordinance on fair housing was voted down was due to the fact that the voters did not want a fair housing law in Toledo. There is no possible way to know why the voters turned down the particular ordinance presented to them. It could just as easily be assumed that the reason it was turned down was that it was not strong enough.

It can thus be seen that petitioners' whole case is based on a premise that is merely their own conclusion and one on which there was no evidence of any kind at the time of trial.

**B. Constitutional question not properly before the Court at this time.**

The courts are not empowered to give advisory opinions as to the constitutional validity of laws as applied to possible future eventualities. It is a general rule of law

that the judiciary has no authority to pronounce an opinion, a judgment or a decree upon a mere moot question as to whether a proposed law will conflict with the Constitution if it should be enacted by the General Assembly, or be adopted by the people. Likewise, the Supreme Court of Ohio will not decide constitutional questions until the necessity for such decision arises and it will dismiss for want of jurisdiction a case sought to be reviewed on the theory that it involves a constitutional question where the record does not show that the disposition of the case requires the consideration of a constitutional question. These principles of law are well established in Ohio with citations too numerous to list.

It is further stated in *American Jurisprudence* 2d, "Constitutional Law," Section 112 at pages 299-300 as follows:

> § 112. Refusal to decide abstract, hypothetical, or moot constitutional questions.
>
> The constitutionality of a statute will not be considered and determined by the courts as a hypothetical question, because constitutional questions are not to be dealt with abstractly or in the manner of an academic discussion. Similarly, the courts frequently state that they will not anticipate constitutional issues, and thus the Supreme Court of the United States has declared that it will not assume in advance that a state will so construe its law as to bring it into conflict with the Federal Constitution or an act of Congress. In this connection, it has been said that the principle that the United States Supreme Court will not anticipate a question of constitutional law in advance of the necessity of deciding it carries special weight in maintaining proper harmony in federal-state relations, and consequently must not yield to the claim of the relatively minor inconvenience of postponement of decision.

Some Ohio cases on this issue with which the Supreme Court of the United States has been involved are as follows:

*Belden v. Union Central Life Insurance,* 323 U. S. 674, wherein it was held that constitutional questions will not be decided until the necessity for a decision arises on the record before the court.

*Allied Stores of Ohio, Inc. v. Bowers,* 166 O. State 116, affirmed 358 U. S. 522, wherein the court held that ordinarily constitutional questions will not be considered unless consideration is necessary to decision of the case before the court.

*Hodge Drive-It-Yourself Co. v. The City of Cincinnati,* 284 U. S. 335, wherein the court stated that the claim of denial of equal protection cannot be supported by mere speculation or conjecture.

Applying the above rules to the facts of our case at hand it can readily be seen that the facts of this case do not properly bring the constitutional question before the court. At this time, there is no way of knowing what will happen if the Council of the City of Toledo passes another fair housing law. There is no way of knowing if the Council of the City of Toledo would even consider passing another fair housing law. It is readily apparent that petitioners, therefore, base their whole case on speculation and conjecture.

As stated previously, their case is also based on their interpretation of Section 86 of the Charter of the City of Toledo, Ohio. As pointed out previously, this Section is subject to several interpretations.

Accordingly, it is a universally applied principle in considering constitutional questions that an act will be so construed, if possible, so as to sustain its constitutionality and to avoid conflict with the provisions of the State and

Federal Constitutions, even though such construction is not the most obvious or natural one.

It is further well established in the State of Ohio and elsewhere that where the validity of an act is assailed and there are two possible interpretations, one of which would render it valid, and the other invalid, the court should adopt the former, so as to bring the act into harmony with the constitution.

In closing, it should be pointed out that the cases of *Reitman v. Mulkey,* 387 U. S. 369, and *The State Ex Rel. Hunter v. Erickson Mayor, et al.,* ____ U. S. ____ (unreported), which case this Court has recently agreed to hear on the merits, and similar cases, do not apply to the situation at hand as there were no restrictions contained in either the referendum or the ordinance repealed calling for a specific procedure to follow in order to enact new fair housing laws.

## CONCLUSION.

For the reasons hereinabove stated, it is respectfully requested that the Petition For Writ of Certiorari be denied and that the decisions of the lower Courts be affirmed.

Respectfully submitted,

JOHN A. DEVICTOR, JR.,
*Assistant Director of Law,*
*City of Toledo, Ohio,*
Safety Building,
Toledo, Ohio,
*Attorney for Respondent,*
*City of Toledo, Ohio.*